IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.7.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A) No.1026 of 2007

The Commissioner of Income Tax
Coimbatore. .. Appellant

Vs.

Abdul Rahman Sait .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench dated 4.8.2006 in ITA No.1306/Mds/2004, for the assessment year 1995-96, against the order of the Commissioner of Income Tax, Appeals, Coimbatore for the Assessment Year of 1995-96 in ITA.No.1044/01-02 dated 19.2.2004 and against the Assessment Order of the Deputy Commissioner of Income Tax Circle-I(1) Ootacamund in PAN/GIR.No.1449-C/95-96/I(1) dated:5.7.2001.

For Appellant : Mr.N.Muralikumaran

J U D G M E N T
(Delivered by P.D.DINAKARAN, J.)

The appeal has been preferred by the Revenue against the order dated 4.8.2006 made in ITA No.1306/Mds/2004 passed with reference to the assessment year 1995-96 in favour of the assessee, raising the following substantial questions of law:

> "In the light of the first explanation to section 147 if the assessee did not truly act by bringing to the notice of the assessing officer the declaration of the value of the property which he has made in the wealth tax return, would not be discovery of the same amount to information afresh and in such circumstances, the assessing officer, whether or not is empowered to reopen the assessment within a period of four years from the end of the assessment year, the income chargeable to tax has escaped assessment?"

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2.1. The brief facts led to the filing of the above appeal are as under.

The assessment for the assessment year 1994-95 was completed under Section 143(3) of the Act on 30.1.1998. Thereafter, it was observed that the long term capital gains of Rs.4,46,000/- (as admitted by the assessee and accepted in the assessment order) arising from the sale of assessee's property known as 'Baily Buildings' was incorrectly computed, because the value as on 1.4.1981, adopted on estimate of Rs.6.00 lacs for arriving at the Indexed Cost of Acquisition was not supported with any evidence and in consonance with the fair market value declared by the assessee in the return of wealth filed by him for the assessment year 1989-90. Hence, proceedings under section 147 of the Act were initiated by issue of a notice under section 148 of the Act dated 8.3.2000.

2.2. In response to the notice, the assessee submitted that no income had escaped assessment since all documents filed by the assessee were examined before the completion of the assessment on 30.1.1998. Thereafter, a notice under Section 143(2) of the Act dated 3.11.2000 was issued for reopening of assessment and the same was objected by the assessee contending that the reopening of assessment was bad, as the same was based on the change of opinion either with reference to the change in the method of accounting, much less based on the audit opinion, or change in the method of valuation, particularly, when all the materials were placed by the assessee before the Assessing Officer and the same were examined before the passing of the original order dated 30.1.1998.

2.3. The Assessing Officer, by order dated 5.7.2001, rejected the contention of the assessee and came to the conclusion that there was an escaped assessment in view of the difference between the value of the property known as 'Baily Building' adopted for the purpose of allowing term capital gains, the income tax returns and the value of the property mentioned in the Wealth Tax returns.

2.4. Enraged, the assessee preferred an appeal before the Commissioner, who, by order dated 19.2.2004 accepted the case of the assessee and allowed the appeal holding that the value of the property adopted by the assessee for the purpose of wealth tax did not stop him from contending otherwise in the proceeding for calculating tax on capital gains and that the adoption of certain value for wealth tax purposes could not be made on the basis for working of capital gains, though it was prima facie sufficient for reopening reassessment but in arriving at the conclusion that alone will not be the basis.

2.5. Against the said order, the Revenue preferred an appeal before the Tribunal and the Tribunal, by order dated 4.8.2006, holding that there was no information or new material before the

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Assessing Officer on which he could change his opinion or to believe that the income had escaped assessment, which necessitated to reopen the assessment by initiating reassessment proceedings under Section 147 of the Act, after issuing notice under Section 148 of the Act and therefore, the Assessing Officer had erred in reopening the assessment based on the change of opinion as to the valuation of the property, even though the valuation admitted by the assessee in the income tax return and the wealth tax return were very much available before him while passing the assessment order on 31.1.1998, dismissed the appeal, confirming the order of the Commissioner.

2.6. Aggrieved, the Revenue has preferred the above appeal raising the aforementioned substantial questions of law.

3. In this regard, it is apposite to refer Explanation 1 to Section 147 of the Act, which reads as follows:

> Income escaping assessment:
> If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):
>
> Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.
>
> Explanation 1.- Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

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Explanation 2.- ... "

4.1. A careful reading of the above explanation makes it clear that mere production of the accounts books or other evidence from which material evidence could have been discovered by the Assessing Officer with due diligence by itself would not necessarily amount to disclosure within the meaning of the foregoing proviso.

4.2. In the instant case, it is not the case of the assessee that he has produced accounts books and other evidence from which material evidence could have been discovered by the Assessing Officer, with due diligence, but on the other hand it is the case of the assessee that the Assessing Officer had accepted the returns based on the materials placed before him and passed an order of assessment under the Income Tax Act as well as Wealth Tax Act and thereafter, by change of opinion with reference to the valuation method adopted, proposed to reopen the assessment.

5.1. It is a settled proposition vide the decision of a Division Bench of the Calcutta High Court in *Hela Holdings Pvt. Ltd. v. Commissioner of Income Tax [(2003) 263 ITR 129]* that the *assessee is entitled to change his regular method of accounting by another regular method.* It would be open to the assessee to produce records and show that it had followed such changed accounting method in the subsequent years. In the said decision, the Calcutta High Court also laid the following *general principles regarding tax avoidance and tax evasion*, while dealing with the validity of the change in method of valuation, change in accordance with accounting practice and change followed in subsequent years. The general principles are:

(i) the distinction between tax evasion and tax avoidance is still prevalent.

(ii) generally speaking, *tax evasion is the result of such things as illegality, suppression, misrepresentation and fraud.*

(iii) *tax avoidance is the result of actions taken by the assessee, none of which is illegal or forbidden by the law in itself and no combination of which is similarly forbidden or prohibited.*

(iv) the permissibility of a tax avoidance, will fall to be decided, when and only when, on the basis of the facts and transactions truly and correctly disclosed by the assessee, a point of law arises, whether on a certain reasonable construction of one part of the taxing statute, as applied to the assessee's case, tax which would otherwise be payable by the assessee, becomes not payable in the case in hand.

(v) When the court is faced with a task of construction in the above manner, *the court is not bound to make the construction in favour of the assessee merely on proof by*

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the assessee, that it has entered into no illegality and made no prohibited transaction.

(vi) *the court would have to assess*, in the facts and circumstances of each case, *upon general principles of conscience and justice*, whether the arrangement of affairs by the assessee, so as *to cause the possibility of a reduction of tax* incidence, can fairly be permitted to the assessee, *as a genuine and legal means of tax reduction*, employed by it in a commercial fair sense, or *whether allowing the assessee to earn the reduction*, in the facts and circumstances of the particular case, *is opposed to the public policy of not encouraging citizens to engage themselves in dealings and transactions designed primarily for the purpose of non-payment of tax only.*

(*emphasis supplied*)

5.2. A Full Bench of the Delhi High Court in *Commissioner of Income Tax v. Kelvinator of India Ltd. [(2002) 256 ITR 1)*, interpreting the powers of the Income Tax Officer with respect to reassessment, held that a mere change of opinion cannot form a basis for reopening the completed assessment and further held that when a regular order of assessment is passed under Section 143(3) of the Act, a presumption can be made that such an order has been passed on application of mind. It is well known that a presumption can be raised to the effect that in terms of Section 114(e) of the Indian Evidence Act, judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi judicial function to take benefit of its own wrong. Hence, it is clear that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion.

5.3. Applying the above settled principles, this Court also in *Commissioner of Income Tax v. Annamalai Finance Ltd. [(2005) 275 ITR 451]* held that mere change of opinion by the Assessing Officer with reference to the materials already placed before him cannot be a ground for issue of notice under Section 148 of the Act and reassessment under section 147 of the Act.

5.4. In the instant case, we find that there is every justification as to the finding rendered by the Commissioner that the value of the property adopted by the assessee for the purpose of wealth tax did not stop him from contending otherwise in the proceeding for calculating tax on capital gains, because adoption of certain value for wealth tax purpose cannot be made on the basis for working out the capital gains, particularly when the valuation

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of the property admitted by the assessee in the income tax return and the wealth tax return were accepted by the Assessing Officer and therefore, there cannot be any reassessment based on mere change of opinion by the Assessing Officer.

6. Incidentally, an attempt was also made on behalf of the Revenue that the Tribunal ought not to have held that the reopening of assessment was not in order, as the finding of the Commissioner that reopening of assessment was held to be in order remain unchallenged by the assessee. But, in our considered opinion, Rule 27 of the Income Tax Rules, which provides that the respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him, takes care of the right of the assessee to sustain the order of the Commissioner.

Finding no substantial question of law, the appeal is dismissed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar.

kpl

To

1.The Assistant Registrar, Income-Tax Appellate Tribunal,
Bench-D, Madras.

2.The Commissioner of Income Tax, Appeals, Coimbatore.

3.The Deputy Commissioner ofo Income Tax Circle-I, Ootacamund.

One cc to Mr.N.Muralikumar, Sr.Standing Counsel for (IT)
SR.No.41666

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